(2)

No. 01-106

OCT 18 2001

In the Supreme Court of the United States

CLERK

LORENZO AVENDANO-RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was deprived of his Sixth Amendment right to counsel by the trial court's decision to proceed to trial with petitioner representing himself and with his attorney acting as standby counsel.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	13
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Adams v. *Carroll*, 875 F.2d 1441 (9th Cir. 1989)	17
Adams v. *United States ex rel. McCann*, 317 U.S. 269 (1942)	15
Apprendi v. *New Jersey*, 530 U.S. 466 (2000)	13
Berry v. *Lockhart*, 873 F.2d 1168 (8th Cir. 1989)	17
Burton v. *Collins*, 937 F.2d 131 (5th Cir.), cert. denied, 502 U.S. 1006 (1991)	17
Faretta v. *California*, 422 U.S. 806 (1975)	15
Fields v. *Murray*, 49 F.3d 1024 (4th Cir.), cert. denied, 516 U.S. 884 (1995)	17
Fitzpatrick v. *Wainwright*, 800 F.2d 1057 (11th Cir. 1986)	17
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	14
Jackson v. *Ylst*, 921 F.2d 882 (9th Cir. 1990)	17
Johnson v. *Zerbst*, 304 U.S. 458 (1938)	15
Marshall v. *Dugger*, 925 F.2d 374 (11th Cir. 1991)	17, 18
McKee v. *Harris*, 649 F.2d 927 (2d Cir. 1981), cert. denied, 456 U.S. 917 (1982)	15
Moreno v. *Estelle*, 717 F.2d 171 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984)	17
Perry v. *United States*, 364 A.2d 617 (D.C. 1976)	17
State v. *Garcia*, 600 P.2d 1010 (Wash. 1979)	17
United States v. *Auen*, 864 F.2d 4 (2d Cir. 1988)	16

Cases—Continued: Page

United States v. *Goldberg*, 67 F.3d 1092 (3d Cir. 1995) 14
United States v. *Kneeland*, 148 F.3d 6 (1st Cir. 1998) 14
United States v. *Moore*, 706 F.2d 538 (5th Cir.), cert. denied, 464 U.S. 859 (1983) 16
United States v. *Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989) 15
United States v. *Oreye*, 263 F.3d 669 (7th Cir. 2001) 16
United States v. *Smith*, 62 F.3d 1073 (8th Cir. 1996) 14
United States v. *Weisz*, 718 F.2d 413 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027 (1984) 17
United States v. *Welty*, 674 F.2d 185 (3d Cir. 1982) 15
United States v. *Willie*, 941 F.2d 1384 (10th Cir.), cert. denied, 502 U.S. 1106 (1992) 17
Wisniewski v. *United States*, 353 U.S. 901 (1957) 17

Constitition and statutes:

U.S. Const. Amend. VI 14, 15
21 U.S.C. 841(a)(1) 2
21 U.S.C. 853 (1994 & Supp. V 1999) 2

In the Supreme Court of the United States

No. 01-106

LORENZO AVENDANO-RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unpublished, but the judgment is noted at 242 F.3d 377 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. A4) was entered on December 19, 2000. A petition for rehearing was denied on February 15, 2001 (Pet. App. A7). On May 2, 2001, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 15, 2001. The petition was filed on July 16, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted on four counts of distribution of methamphetamine in violation of 21 U.S.C. 841(a)(1). The jury found that $3210 was subject to forfeiture pursuant to 21 U.S.C. 853 (1994 & Supp. V 1999). The court sentenced petitioner to 121 months in prison, to be followed by five years of supervised release.

1. During January and February 2000, petitioner sold methamphetamine to cooperating witnesses four times. The transactions were tape-recorded and were also observed by law enforcement personnel. Trial Tr. 142-171, 216-245.

2. Petitioner's trial began on May 4, 2000. Because petitioner's native language is Spanish, two interpreters were present. Trial Tr. 2. As jury selection was about to begin, petitioner stood, pounded the table, and announced that he did not "want to hear anything." *Ibid.* The court ordered him to sit down, but petitioner continued that he "want[ed] a different lawyer" because "this lawyer hasn't done anything for me." *Ibid.*

After excusing the prospective jurors, the court sought to learn the reason for petitioner's disruption. The court began with defense counsel, Joseph Lopez-Wilson, who replied:

> As I told you over the phone, my client has a problem with me representing him. * * *. We've gone over all the evidence. I've told him the possibilities of how the case may turn out and apparently he doesn't like that.

Trial Tr. 3. The court also discussed the situation with petitioner:

> THE DEFENDANT: I want another attorney. I want to tell you that I want another attorney because this attorney has not represented me. He has not done anything for me.
>
> THE COURT: Well, what is it specifically that you think he hasn't represented you on?
>
> THE DEFENDANT: This attorney hasn't done anything for me yet.
>
> THE COURT: What do you mean? What do you want him to do for you, sir?
>
> THE DEFENDANT: Something. He can do something for me. This attorney hasn't done anything for me. I want another attorney.
>
> THE COURT: Well, you know, here we are, it's the day of trial. And, you know, when you simply say he's done nothing for you, I don't know what that means.

Id. at 4.

The court asked defense counsel whether he had conferred with his client. Counsel replied that he had conferred with petitioner and "presented all the evidence to him," but stated that petitioner "apparently * * * doesn't like the way I look at the evidence and feels that someone else could make the evidence go away." Trial Tr. 4. Counsel also told the court that he was prepared to go to trial. *Id.* at 5.[1]

---

[1] The Assistant United States Attorney later informed the court that he had talked with defense counsel 10-15 times "about

The court announced that it was denying petitioner's request for a new lawyer. Trial Tr. 5. Petitioner interrupted the court, repeating his demand for another attorney. *Ibid.* The court said that it "under[stood]" petitioner's position, but reaffirmed its ruling that it was not giving another attorney to petitioner and stated that "[w]e're going to trial now." *Ibid.*

Petitioner then interrupted the court again, exclaiming "[t]hen I do not want to listen to anything." Trial Tr. 5. The court warned petitioner that he would be removed if he disrupted the proceedings. *Id.* at 5-6. When petitioner replied that he wanted another attorney, the court responded:

> THE COURT: Well, I'm telling you you're not going to have another attorney. And if you don't want this one, why, you can try the case yourself. You can try the case pro se. But I advise against that because there's many * * * complicated things involved here and you need an attorney. And you best use the one you've got.
>
> THE DEFENDANT: But I do not want this attorney, I said.
>
> THE COURT: You're either having—
>
> THE DEFENDANT: I already told him that I did not want this attorney.

---

different aspects of the case" and about potential plea bargains. Trial Tr. 7. Defense counsel also told the court that he had met with petitioner "at least five times," and that he had spoken with petitioner's family "on at least three different occasions." *Id.* at 18-19.

> THE COURT: I'm telling you that you're going to proceed to trial with this attorney or you're going to proceed to trial with no attorney at all.

Id. at 6.

Defense counsel moved to withdraw from the case. Trial Tr. 8. Counsel explained that he had "asked my client on several occasions if that's his wish, and he says yes, and it doesn't matter if he goes alone." *Ibid.* Counsel stated that he "probably should ask the Court to allow me to withdraw and let him proceed pro se" and that he believed that his request was consistent with his client's wishes. *Ibid.*

The court asked petitioner numerous times whether he wanted to proceed pro se, but petitioner refused to answer and kept insisting that he wanted another attorney. Trial Tr. 8. The court reiterated that it understood "what you're saying to me. But you're apparently not understanding what I'm saying to you, and that is we're going to trial here today and you're either going to trial with this attorney or you're going to trial with no attorney." *Ibid.* The court told petitioner that it was going to allow defense counsel to withdraw and stated "that means you're going to trial here today without an attorney, Mr. Avendano. Do you want to do that?" *Id.* at 9. Instead of answering, petitioner said once more that he wanted a new lawyer. *Ibid.*

The court turned to advising petitioner about his constitutional right to proceed pro se and warning him of the perils of doing so. The court told petitioner that he could represent himself but that any waiver of his right to counsel had to be knowing and voluntary. Trial Tr. 9-10. Although the court made several attempts to find out whether petitioner understood these rights,

petitioner did not respond and repeated his demand for a different lawyer. *Ibid.* With some difficulty, the court was able to determine that petitioner had not studied law or previously represented himself in court and that he was unaware of the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. *Id.* at 10-14. Petitioner did not respond to the court's efforts to learn whether he understood the charges against him, the potential sentences he faced, and that the court would be unable to advise him about how to try his case if he proceeded pro se. *Id.* at 11-13, 17. The court also told petitioner "that in my opinion you would be far better defended by Mr. Joseph Wilson Lopez who is your attorney now than you can by yourself" and "strongly urge[d]" petitioner "not to try to represent" himself. *Id.* at 14-15. The court continued:

> THE COURT: All right. You know what the penalties are that you're facing if you're found guilty. And in view of those and in light of all the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by Mr. Wilson?
>
> THE DEFENDANT: No, I just want a different lawyer. I just want you to get me a different lawyer.
>
> THE COURT: I've told you several times, Mr. Avendano, that I'm not going to appoint you a different attorney. No justification or good cause has been shown to me why that ought to be done, other than your desire, which isn't standing in and of itself.

THE DEFENDANT: He hasn't done anything for me. So far he hasn't done anything for me.

THE COURT: I take it from your response to the Court then that you wish to represent yourself instead of having Mr. Wilson represent you; is that correct?

THE DEFENDANT: No, I don't want to be my own lawyer. I just want to get a lawyer that's going to represent me correctly.

THE COURT: Well then, you wish Mr. Wilson to assist you and represent you, do you?

THE DEFENDANT: I want a different one, I don't want him.

THE COURT: All right. Well, I've told you you're not going to get a different one. You've shown me no good cause why you should get a different one.

Now, we're going to proceed to trial and we're going to proceed to trial either with you being represented by Mr. Wilson or you representing yourself. Which is it?

THE DEFENDANT: He hasn't represented me. He hadn't come to see me until just about a week ago. I was there several months in jail. He didn't come to see me until just about a week ago.

THE COURT: Mr. Wilson, is that true?

MR. LOPEZ-WILSON: No, your Honor, it's not. As you know, every time we go to jail we sign in. There's at least five times that I've gone to see him.

I've spoken with the family on at least three different occasions. They've come to—I brought a witness because I thought he might say that. She works at my office. She knows that we've accepted numerous phone calls from him as well as his family to discuss this aspect of the case. But as you can see, it's very difficult to represent him.

I would again ask you to allow me to withdraw from the case and let him go pro se or get a court-appointed attorney. I don't think I could defend him after the things he's said.

THE COURT: Now, do you want Mr. Wilson to represent you or are you going to represent yourself in this trial?

THE DEFENDANT: I just want a different lawyer.

THE COURT: I'm telling you you're not going to get a different lawyer, Mr. Avendano. And I'm going to ask you once more—

THE DEFENDANT: Well, let me have a trial with a different lawyer later.

THE COURT: No, we're not going to have a trial with a different lawyer later, we're going to have a trial now. Do you want to represent yourself in this trial or do you want Mr. Wilson to represent you?

THE DEFENDANT: I don't want him as a lawyer as I told you already.

> THE COURT: Then we'll allow you to represent yourself. And I'm appointing you, Mr. Wilson, as standby counsel.

Trial Tr. 17-20. Defense counsel expressed reservations about acting as standby counsel, but the court denied counsel's request to withdraw from the case. *Id.* at 20-21.

At the conclusion of this process, the court stated:

> THE COURT: * * * I find that due to the defendant's action, he has knowingly and voluntarily waived his right to the services of Mr. Joe Lopez-Wilson, his court-appointed attorney.
>
> And I'm going to allow the defendant, therefore, to represent himself with, as I've done here, the assistance of standby counsel with Mr. Wilson performing such.

Id. at 23-24.

When the jury panel returned for jury selection, petitioner asked to be removed from the courtroom:

> THE COURT: Please be seated. You please be seated too, Mr. Avendano. Please be seated.
>
> THE DEFENDANT: I don't want to hear anything.
>
> THE COURT: All right.
>
> THE DEFENDANT: I don't want to hear anything until I have a different lawyer.
>
> THE COURT: Mr. Avendano, I've given you fair warning. You either have to be seated now and remain silent, or else I'll have to remove you from the courtroom.

> THE DEFENDANT: Then take me out. Remove me.
>
> THE COURT: All right. Marshals, take him out to the entryway here. And I want—get a chair for him out there and one of you interpreters go out there, open the door slightly so you can hear what's going on in here and interpret to him.
>
> Mr. Avendano, if at any time you wish to come back into the courtroom, you may do so. Simply tell the marshals and you'll be allowed to return.

Trial Tr. 25. Just before it was to begin questioning the jury panel, the court specifically asked petitioner if he wished to return to the courtroom, but petitioner declined the offer. *Id.* at 29. Petitioner also declined an invitation to return before the government began its questioning of the panel. *Id.* at 47-48.

Before peremptory strikes were exercised, the court asked petitioner whether he wanted to ask any questions of the jury panel. Petitioner apologized to the court but reiterated that he wanted another attorney. Trial Tr. 58. Petitioner named the attorney he wanted, but defense counsel informed the court that the attorney in question had told the prosecutor that he would not take the case on such short notice. *Id.* at 58-59. Petitioner declined the court's offer to participate in exercising the peremptory strikes. *Id.* at 59-60.

After jury selection was completed, petitioner declined to be present in the courtroom. The court encouraged him to return for opening statements, but petitioner repeated his demand for a different attorney. Trial Tr. 72-73. At petitioner's request, he was taken back to his holding cell. *Id.* at 74-75. The court gave its preliminary instructions, and the prosecutor and

defense counsel made their opening statements. *Id.* at 78-96.[2]

On the second day of trial, the court asked petitioner to return to the courtroom for the presentation of evidence. When petitioner declined, he was taken back to the holding cell. Trial Tr. 102. Before the jury was brought in, the court and counsel discussed Lopez-Wilson's role. *Id.* at 103- 104. The court stated that it "expect[ed] Mr. Wilson to continue to act as he has already acted and that is representing the defendant in his absence." *Id.* at 104.

The government called nine witnesses. Petitioner was brought back to the courtroom so the first witness could identify him, Trial Tr. 125-126, and remained during Lopez-Wilson's cross-examination of the witness. *Id.* at 126-129. At the conclusion of the cross-examination, the court asked petitioner whether he had any questions to ask the witness. *Id.* at 130. Petitioner responded that he "[could not] say anything until I do not have my other attorney." *Ibid.*

During the direct examination of the second witness, petitioner announced that he "[did not] want to listen to anything until I have my other lawyer." Trial Tr. 149-

---

[2] Although the court appointed Lopez-Wilson as petitioner's "standby counsel," he performed a variety of functions throughout the trial. On petitioner's behalf, Lopez-Wilson participated in jury selection, Trial Tr. 36, 57-58, 59-60, delivered an opening statement, *id.* at 95-96, objected and conducted foundational examinations during the government's presentation of its evidence, *id.* at 109, 113-117, 119-120, 121, 123-124, 133, 156-157, 176, 178, 179-180, 184-185, 217, 218, 219, 224, 225-226, 232, 234, 236, 240, 242, 273, 278, 299-300, 302-303, 307, 317, 319, 338, cross-examined the government's witnesses, *id.* at 127-129, 188-209, 245-265, 268-269, 279-280, 283-285, 305-306, 311-313, and delivered a closing argument, *id.* at 345-354.

150. After the witness identified him, petitioner was returned to his holding cell. *Id.* at 150. Petitioner was brought back to the courtroom before cross-examination of the second witness so that Lopez-Wilson could speak to him. *Id.* at 185-187. Lopez-Wilson informed the court that petitioner did not want to be present for the rest of the proceedings, did not want any input into the cross-examination, and did not want Lopez-Wilson to do anything. *Id.* at 187. Petitioner was taken back to his holding cell, and the court told Lopez-Wilson to "give [petitioner] the best representation you can give." *Id.* at 188.

Petitioner was brought back to the courtroom at the conclusion of the direct examination of the third witness. After the witness identified him, petitioner again stated that he did not want to be in the courtroom until he had another attorney. He was then removed, Trial Tr. 220-224, and remained outside the courtroom during the testimony of the remaining six witnesses, who testified about the chain of custody of the methamphetamine. The government then rested. *Id.* at 320.

Defense counsel moved to have the case dismissed for lack of evidence and for a continuance so that he could confer with petitioner about putting on a defense. Trial Tr. 320. The court denied both motions, but ordered a brief recess to permit defense counsel to talk with petitioner. *Ibid.* After the recess, petitioner stated on the record that he did not want to testify, the defense rested, and court was adjourned for the day. *Id.* at 321.

On the third day of trial, the district court inquired whether petitioner wished to be in the courtroom for the closing arguments and the jury instructions. Petitioner responded that he wanted his new attorney to be

present. The court told petitioner that he was represented by Lopez-Wilson and that no other attorney had entered an appearance. Trial Tr. 332-334. Petitioner remained in the courtroom for the closing arguments and the jury instructions. *Id.* at 361. The jury found petitioner guilty on all four counts and found $3210 subject to forfeiture as illegal drug proceeds. *Id.* at 364-365, 369.

3. The court of appeals affirmed. Pet. App. A1-A3. The court held that the district court did not abuse its discretion in denying petitioner's motion for substitute counsel on the eve of trial because "[petitioner] failed to show any justifiable dissatisfaction with his retained attorney, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications." *Id.* at A1. The court also held that the district court did not err in allowing petitioner to represent himself with his retained attorney as standby counsel. *Id.* at A2. "Having reviewed the particular facts * * * [of] the case," the court concluded that "the district court made [petitioner] aware of his right to counsel or to represent himself, and of the possible consequences if he decided to proceed without counsel's help." *Ibid.* The court accordingly rejected petitioner's claim that his waiver of the right to counsel was not knowing, voluntary, and intelligent. *Ibid.*[3]

ARGUMENT

Petitioner contends (Pet. 8-30) that he was improperly forced to represent himself at trial because he did

---

[3] The court of appeals also rejected petitioner's claim that the district judge should have recused himself from considering petitioner's motion for a new trial and petitioner's claim that his sentence violated *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Pet. App. A2-A3. Petitioner does not renew those claims here.

not knowingly and intelligently waive his right to counsel and did not clearly and unequivocally assert his right to self-representation. The court of appeals correctly rejected that claim, and its unpublished, fact-bound decision presents no issue warranting further review.

1. The Sixth Amendment protects the right to the assistance of counsel at a felony trial. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Nevertheless, the Constitution does not give a defendant the right to delay his trial unreasonably in order to change counsel. A district court is entitled to deny a defendant's last-minute request to change lawyers unless the defendant presents a sufficient reason for the proposed switch. See, *e.g.*, *United States* v. *Smith*, 62 F.3d 1073, 1077 (8th Cir. 1996); *United States* v. *Goldberg*, 67 F.3d 1092, 1098 (3d Cir. 1995).

The district court denied petitioner's request for a new attorney here because petitioner failed to offer a specific or sufficient justification in support of it. The court of appeals correctly affirmed that holding, Pet. App. A3, and petitioner does not challenge it here. Accordingly, although petitioner had the right to be represented by counsel, he did not have the right to refuse representation by Lopez-Wilson and then to delay the trial to procure new counsel. The question before this Court, therefore, is whether, when petitioner stated his desire not to have Lopez-Wilson as counsel, the district court permissibly held that petitioner had waived his right to counsel and elected to proceed pro se. Cf. *United States* v. *Kneeland*, 148 F.3d 6, 11-12 (1st Cir. 1998) (holding that the fact that a defendant would prefer to be represented by a different attorney does not mean that he may not be required to choose between being represented by his court-

appointed lawyer and proceeding pro se); *United States* v. *Moya-Gomez*, 860 F.2d 706, 739 (7th Cir. 1988) (same), cert. denied, 492 U.S. 908 (1989); *United States* v. *Welty*, 674 F.2d 185, 188 (3d Cir. 1982) (same); *McKee* v. *Harris*, 649 F.2d 927, 931 (2d Cir. 1981) (same), cert. denied, 456 U.S. 917 (1982).

In *Faretta* v. *California*, 422 U.S. 806, 832-834 (1975), this Court held that the Sixth Amendment guarantees a defendant the right to forgo counsel and conduct his own defense. Because a defendant who represents himself "relinquishes * * * many of the traditional benefits associated with the right to counsel," a defendant seeking to proceed pro se "must 'knowingly and intelligently'" waive that right. *Id.* at 835 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938)). Moreover, the Court has stated that a defendant seeking to proceed pro se "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Ibid.* (quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

Petitioner claims (Pet. 8-26) that he did not knowingly and intelligently waive his right to counsel because he never "clearly and unequivocally" expressed a desire to proceed pro se.[4] But the situation confronting the district court required it to determine, as best it could, petitioner's desires in the face of his refusal to respond directly to the court's questions. The court made it clear that petitioner could proceed to trial with Lopez-Wilson, or he could choose to represent himself,

---

[4] Petitioner does not contend that the district court failed to make him aware of the "dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835; see Trial Tr. 10-17.

but he did not have the right to delay the trial by electing to proceed only with new counsel. The court attempted to have petitioner acknowledge expressly that he understood the consequences of forgoing representation by Lopez-Wilson, but petitioner would not do so. It was only after repeated explanation of petitioner's options that the district court found that petitioner had knowingly and voluntarily waived his right to counsel. Under these circumstances, the district court's interpretation of petitioner's decision was within the bound of its discretion. See, *e.g.*, *United States* v. *Oreye*, 263 F.3d 669, 670 (7th Cir. 2001) (Posner, J.) ("[A] defendant can waive his right to counsel through conduct as well as words. * * * Oreye was told that if he dismissed [his lawyer] and didn't find a substitute at his own expense, he would have to proceed pro se. If you're given several options, and turn down all but one, you've selected the one you didn't turn down."); *United States* v. *Auen*, 864 F.2d 4, 5 (2d Cir. 1988) (holding that defendant had validly waived his right to counsel when defendant failed to retain counsel despite the fact that the district court had "repeatedly offered [him] the opportunity to obtain legal representation"); *United States* v. *Moore*, 706 F.2d 538, 540 (5th Cir.) ("[A] persistent, unreasonable demand for dismissal of counsel and appointment of new counsel * * * is the functional equivalent of a knowing and voluntary waiver of counsel."), cert. denied, 464 U.S. 859 (1983).

2. Petitioner contends that the circuits are divided on whether a defendant may be deemed to have chosen to proceed pro se in circumstances comparable to those in this case, but there is no conflict warranting this

Court's review.[5] In *Marshall* v. *Dugger*, 925 F.2d 374 (11th Cir. 1991), the court of appeals did resolve a similar issue, but the facts of that case were different in

---

[5] In most of those cases, courts of appeals rejected defendants' claims that they had been denied their right of self-representation; those courts thus did not confront the question here of whether a defendant was required to proceed pro se without a valid waiver of counsel. See *Fields* v. *Murray*, 49 F.3d 1024, 1033-1034 (4th Cir.) (en banc), cert. denied, 516 U.S. 884 (1995); *Burton* v. *Collins*, 937 F.2d 131, 133-134 (5th Cir.), cert. denied, 502 U.S. 1006 (1991); *Jackson* v. *Ylst*, 921 F.2d 882, 888-889 (9th Cir. 1990); *United States* v. *Weisz*, 718 F.2d 413, 424-428 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027, 1034 (1984); *Moreno* v. *Estelle*, 717 F.2d 171, 173-176 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); see also *State* v. *Garcia*, 600 P.2d 1010, 1015 (Wash. 1979); *Perry* v. *United States*, 364 A.2d 617, 620 (D.C. 1976). In two other cases, courts rejected defendants' claims that they had been denied their right to counsel, finding that the defendants had clearly and unequivocally asserted their right to self-representation. *United States* v. *Willie*, 941 F.2d 1384, 1388-1391 (10th Cir.) (noting defendant's "repeated and unequivocal assertions of his right to self-representation"), cert. denied, 502 U.S. 1106 (1992); *Fitzpatrick* v. *Wainwright*, 800 F.2d 1057, 1064-1065 (11th Cir. 1986) (defendant "signed a written waiver expressly waiving his right to be represented by counsel"). In *Adams* v. *Carroll*, 875 F.2d 1441, 1444-1445 (9th Cir. 1989), the court concluded that the defendant had been denied his right of self-representation. None of these courts was required to address a situation in which a defendant, at that time of trial, forcefully and repeatedly waives the services of the only attorney to whom he is entitled but insists that he will only go to trial with new counsel.

Petitioner's claim (Pet. 16-20) that the court of appeals' decision conflicts with its earlier decision in *Berry* v. *Lockhart*, 873 F.2d 1168 (8th Cir. 1989), is incorrect. In *Berry*, the court held that the trial court had conducted an inadequate inquiry to determine whether the defendant's waiver of his right to counsel was voluntary, knowing, and intelligent. *Id.* at 1170-1171. Moreover, any inconsistency with *Berry* would be a matter for the Eighth Circuit to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

relevant respects. In *Marshall*, a district court rejected a defendant's request for new counsel and informed the defendant that his choices consisted of proceeding with his current lawyer, representing himself, or representing himself with his current lawyer functioning as standby counsel. See *id.* at 375-376. The defendant refused to select one of the three options and simply repeated his dissatisfaction with his current lawyer. See *id.* at 376. The court declined the prosecutor's request that it explain the dangers of proceeding pro se, stating that the defendant was "pretty much * * * aware of what it's going to be like to have to represent himself." *Ibid.* The court excused defense counsel, and the defendant was convicted after representing himself without the aid of standby counsel. *Ibid.*

The Eleventh Circuit held that the district court had improperly required the defendant to proceed pro se. The court explained that the defendant had not "knowingly and intelligently" waived his right to counsel because, absent "an oral or written *request*" to proceed pro se, he had not "affirmatively chose[n] self-representation." 925 F.2d at 377 (internal quotation marks and citation omitted). Although not "formally reach-[ing] the issue," the panel also indicated that it "would find the evidence insufficient to support the contention that [the defendant's] waiver was 'knowing and intelligent'" because the district court "made no inquiry into [the defendant's] understanding of the dangers and disadvantages of proceeding pro se" and "made no effort to inform him of these dangers." *Id.* at 377 n.1.

While there is some tension between the waiver analysis in *Marshall* and in this case, review by this Court is not warranted. The Eighth Circuit's unpublished disposition makes clear that its ruling was based

on "the particular facts and circumstances surrounding the case," Pet. App. A2, and the court did not purport to establish or alter any general rule. The Eighth Circuit did not address a situation (like the one presented in *Marshall*) where a district court had been less-than-clear in advising a defendant about his rights and the risks of self-representation, or where a defendant's refusal to respond directly to the court's efforts to elicit his desires was less extreme than it was here. Similarly, because the Eleventh Circuit in *Marshall* said that its decision could be justified on other grounds (*i.e.*, the district court's failure to ensure that the defendant understood the risks of proceeding pro se), it is uncertain how that court would rule in a case (like this one) where the district court did everything reasonably possible to advise the defendant of his rights and options.

Finally, here, unlike in *Marshall*, petitioner had active standby counsel, who presented a full defense. For that reason, the two cases are distinguishable and this case would not be a suitable vehicle for considering the standards governing a defendant's waiver of the right to counsel and invocation of the right of self-representation. Although the district court appointed Lopez-Wilson only as petitioner's "standby counsel," the court repeatedly emphasized that it expected Lopez-Wilson to act as petitioner's lawyer while petitioner chose to absent himself from the trial. Trial Tr. 104, 188. The record reflects that Lopez-Wilson did so, performing all of the functions of defense counsel. See note 2, *supra*. Although petitioner correctly notes that Lopez-Wilson "presented no evidence on the Petitioner's behalf," Pet. 7, the record shows that that was because *petitioner* waived his right to testify, Trial Tr. 321, and because the district court denied Lopez-

Wilson's motion for a continuance to permit him "to put on some evidence," *id.* at 320 (a ruling that petitioner did not challenge before the court of appeals and does not attack here). Because petitioner was functionally represented by counsel throughout his trial, this case presents an inapt vehicle for deciding whether the district court erred in holding that he voluntarily waived that right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

OCTOBER 2001